5-16-2013

State v. Williams Respondent's Brief Dckt. 40077

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. JASON LEONARD WILLIAMS, Defendant-Appellant.	)	Nos. 40077, 40078 Bonneville Co. Case No. CR-2004-12392, CR-2004-20647

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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Nature Of The Case

Jason Leonard Williams appeals in consolidated Docket Nos. 40077 and 40078 from the district court's orders revoking his probation and executing the sentences imposed upon his convictions for possession of a controlled substance, burglary, and aiding and abetting grand theft.

Statement Of The Facts And Course Of The Proceedings

In June 2004, Williams and Anthony Boyette broke into a home and stole numerous items, including jewelry, two guns and ammunition, and several financial transaction cards. (PSI, pp.2, 23-24, 34-36, 70-72.[1]) Williams, Boyette and others subsequently used the financial transaction cards to make multiple purchases at several local businesses. (PSI, pp.24-28, 30-32, 36.) When apprehended by police, Williams admitted to having assisted Boyette in burglarizing the home. (PSI, pp.34-36, 70-72.) He also admitted to having assisted Boyette in a number of other "jobs" involving the theft of items from vehicles, homes, garages and construction sites. (PSI, pp.36-37, 73-76.)

The state charged Williams in Docket No. 40078 (CR-04-12392) with one count of burglary and one count of aiding and abetting grand theft. (R., pp.20-21.) Pursuant to a plea agreement, Williams pled guilty as charged and the state dismissed a charge in an unrelated case. (R., pp.24A-26.) The district court accepted plea, imposed concurrent unified sentences of four years, with two

[1] Unnumbered pages attached to the PSI have been numbered consecutively, beginning with page15.

years fixed, for burglary and eight years, with two years fixed, for aiding and abetting grand theft, and retained jurisdiction for 180 days. (R., pp.56-57.) Judgment was entered on November 8, 2004. (R., p.56.) Two hundred thirty-four days later, on June 30, 2005, the district court entered an order purporting to suspend the balance of Williams' sentences and place him on probation for four years. (R., pp.68-69.)

Around the same time judgment was entered in Docket No. 40078, the state filed an Information in Docket No. 40077 (CR-04-20647) charging Williams with possessing methamphetamine. (R., pp.133-34.) Williams pled guilty to the charge and the district court imposed a unified sentence of five years, with two years fixed, and retained jurisdiction. (R., pp.137-41.) The court ordered the sentence to run concurrently with the sentences imposed in Docket No. 40078. (R., p.141.) Near the conclusion of the retained jurisdiction period, on June 30, 2005, the district court entered an order suspending the balance of Williams' sentence and placing him on probation for four years. (R., pp.144-47.)

On July 3, 2008, Williams' probation officer filed a report of violation, alleging that Williams had violated his probation by failing to make restitution payments, consuming alcohol at least four times per week, smoking marijuana, being cited for driving without privileges and failing to report the citation to his probation officer, changing residences without permission, living with an individual with whom he was instructed to have no contact, and failing to pay the cost of supervision. (7/3/08 Report Of Probation Violation (Augmentation)). Williams admitted all but one of the allegations (the one relating to restitution

payments) and the district court continued him on probation for two years in both cases, imposing as an additional condition that he participate in and complete felony drug court. (R., pp.72-73, 79-81, 149-50, 156-58.)

On August 4, 2010, Williams' probation officer filed a second report of violation, alleging that Williams had violated his probation by being terminated from drug court for using the synthetic cannibinoid, "Spice." (8/4/10 Report Of Probation Violation (Augmentation).) Williams' probation officer also noted that, during the two years he participated in drug court, Williams had twice been previously sanctioned for using marijuana. (Id.) Williams admitted the allegation, and the district court revoked his probation, ordered his underlying sentences executed and retained jurisdiction for a second time in both cases. (R., pp.84-88, 160-64.) Near the conclusion of the retained jurisdiction period, the district court suspended the balance of Williams' sentences and reinstated him on probation, in both cases, for five years. (R., pp.90-94, 166-70.)

Nine months later, on April 25, 2012, Williams' probation officer filed a third report of violation, alleging that Williams had violated his probation by being terminated from his Therapeutic Community Aftercare and Cognitive Self-Change groups due to his "ongoing drug use and fail[ure] to follow group rules," by associating and smoking "Spice" with another felony probationer, and by smoking both marijuana and "Spice" on several occasions in a four-month period. (4/25/12 Report Of Probation Violation (Augmentation).) Williams admitted the allegations, and the district court revoked his probation and ordered his

underlying sentences executed in both cases. (R., pp.97-100, 103-05, 172-75, 178-80.)

Williams filed notices of appeal, in both cases, on May 30, 2012. (R., pp.106-08, 181-83.) He also filed motions for reduction of his sentences, which the district court denied. (R., pp.112-13, 116-17, 187-88, 191.)

After the appellate record was settled, Williams filed a motion to suspend the briefing schedule and to augment the record with numerous as-yet unprepared transcripts, including a transcript of his December 2004 change of plea and sentencing hearing and transcripts of the admission and disposition hearings associated with his first and second probation violations. (10/25/12 Motion.) The state filed an objection. (10/29/12 Objection.) The Idaho Supreme Court denied Williams' motion with respect to each of the aforementioned requested transcripts. (11/7/12 Order.)

ISSUES

Williams states the issues on appeal as:

1. Did the Idaho Supreme Court deny Mr. Williams due process and equal protection when it denied his Motion to Augment with transcripts necessary for review of the issues on appeal?

2. Did the district court abuse its discretion when it denied [sic] failed to reduce his sentences *sua sponte* in both cases?

(Appellant's brief, p.5.)

The state rephrases the issues as:

1. Has Williams failed to establish that the Idaho Supreme Court violated his constitutional rights when it denied his motion to augment the appellate record with irrelevant transcripts?

2. Must Williams' appeal in Docket No. 40078 be dismissed as untimely?

3. Has Williams failed to establish that the district court abused its discretion by not *sua sponte* reducing his sentence upon revoking probation in Docket 40077?

ARGUMENT

I.
Williams Has Failed To Establish That The Idaho Supreme Court Violated His Constitutional Rights When It Denied His Motion To Augment The Appellate Record With Irrelevant Transcripts

A. Introduction

Williams contends that, by denying his motion to augment the appellate record with as-yet unprepared transcripts of his 2004 guilty plea and sentencing hearing and other court hearings associated with his first and second periods of supervised probation, the Idaho Supreme Court has violated his constitutional rights to due process, equal protection, and effective assistance of counsel. (Appellant's brief, pp.6-20.) Application of the relevant law shows Williams has failed to establish any constitutional violation resulting from the denial of his motion to augment the record with the requested transcripts.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. Williams Has Shown No Violation Of His Rights To Due Process, Equal Protection Or Effective Assistance Of Counsel

A defendant in a criminal case has a due process right to "a record on appeal that is sufficient for adequate appellate review of the errors alleged

regarding the proceedings below." State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002) (citing Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington State Bd. Of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956)); see also State v. Morgan, 153 Idaho 618, ___ , 288 P.3d 835, 838 (Ct. App. 2012); State v. Cornelison, ___ Idaho ___, ___ P.3d ___, 2013 WL 1613842 (Idaho App., April 11, 2013) (petition for review pending). The state, however, "will not be required to expend its funds unnecessarily" to provide transcripts that "will not be germane to consideration of the appeal." Draper, 372 U.S. at 495; see also M.L.B. v. S.L.J., 519 U.S. 102, 123 (1996) (indigent appellant has right to "a transcript of relevant trial proceedings"). Rather, an indigent defendant is entitled, at state expense, to only those transcripts and portions of the record necessary to pursue the issues raised on appeal. Griffin, 351 U.S. 12; Lane, 372 U.S. 477. To show prejudice Williams "must present something more than gross speculation that the transcripts were requisite to a fair appeal." Scott v. Elo, 302 F.3d 598, 605 (6th Cir. 2002).

In Morgan, the Idaho Court of Appeals rejected Morgan's contention that the Idaho Supreme Court violated his constitutional rights in denying his motion to augment the appellate record with transcripts of hearings associated with the first of his two probation violation proceedings. Morgan, 153 Idaho at ___, 288 P.3d at 837-839. At the outset, the Idaho Court of Appeals "disclaim[ed] any authority to review, and, in effect, reverse an Idaho Supreme Court decision made on a motion made prior to assignment of the case to [the Idaho Court of

Appeals] on the ground that the Supreme Court decision was contrary to the state or federal constitutions or other law." Id. at ___, 288 P.3d at 837. Such an undertaking, the Court explained, "would be tantamount to the Court of Appeals entertaining an 'appeal' from an Idaho Supreme Court decision and is plainly beyond the purview of this Court." Id.; see also Cornelison, 2013 WL 1613842 at *2-3 (rejecting Cornelison's argument that I.A.R. 108(a) granted the Idaho Court of Appeals the implicit authority to review the Idaho Supreme Court's denial of his motion to augment the appellate record).

However, the Idaho Court of Appeals did leave open the possibility of review of such motions in some circumstances. Morgan, 153 Idaho at ___, 288 P.3d at 837. Such circumstances may occur, the Court indicated, where "the completed briefs have refined, clarified, or expanded issues on appeal in such a way as to demonstrate the need for additional records or transcripts, or where new evidence is presented to support a renewed motion." Id.

Should the Idaho Court of Appeals be assigned this case, it lacks the authority to review the Idaho Supreme Court's order. Williams has failed in his Appellant's brief to demonstrate the need for additional transcripts, and he has not presented any evidence to support a renewed motion to augment the record. The arguments Williams advances in his Appellant's brief as to why the record should be augmented with the transcripts at issue constitute essentially the same arguments he presented to the Idaho Supreme Court in his motion – *i.e.*, that the district court may have relied on statements or evidence from those hearings in

making its final decision to revoke probation and order his sentences executed without reduction. (Compare 10/25/12 Motion with Appellant's brief, pp.6-18.)

Williams acknowledges Morgan, but contends that "the Morgan Court's statement that Mr. Morgan could have filed a renewed motion to augment directly with the Court of Appeals [in order to demonstrate the need for additional records or transcripts] is contrary to the Appellate Rules," which, according to Williams, "require all motions to be filed directly with the Idaho Supreme Court." (Appellant's brief, pp.13-14, n.5.) However, the Idaho Court of Appeals recently rejected a nearly identical argument in Cornelison, reasoning:

> We reject that interpretation of the rule because we recognize this to be contrary to the grant of authority in Idaho Appellate Rule 101. That rule provides in part, "The Idaho Appellate Rules shall apply to all proceedings in the Court of Appeals as well as the following rules." I.A.R. 101. By way of Rule 101, this Court also has authority to entertain motions to augment the record as provided by Rule 30 after the case has been assigned to this Court. Moreover, if we were to accept Cornelison's interpretation, it would result in a lack of authority of this Court to entertain any motions. Idaho Appellate Rule 32(c), applicable to the Court of Appeals via Rule 101, allows any other motions permitted under the rules, other than a motion to dismiss, to be made at any time, before or after the case is set for oral argument. By way of that authority, this Court routinely rules on motions such as motions for continuance, motions regarding briefing (including motions to join briefing, file supplemental briefing, exceed the page limits, revise a brief, request an extension of time to file a brief, or request permission to file a late brief), motions to expedite the appeal, motions to withdraw as counsel, motions for a stay of proceedings, motions to augment the record, renewed motions to augment the record, and motions to allow or to vacate oral argument. Under the Idaho Appellate Rules, we have the authority to review and rule on motions made by a party after the case has been assigned to this Court.

> In sum, we adhere to our conclusion in Morgan that reviewing the denial of a motion to augment the record by the Supreme Court is beyond the scope of our authority. If a party files a renewed motion after the case assignment to this Court and presents new information or justification for the motion, we have the authority to rule on the motion.

Cornelison, 2013 WL 1613842 at *4.[2]

Because the Idaho Court of Appeals lacks the authority to review, and in effect, reverse a decision of the Idaho Supreme Court, and because Williams has failed to provide any new evidence or clarification in his Appellant's brief that would permit the Idaho Court of Appeals to do so, the Idaho Court of Appeals must decline, if it is assigned this case, to review the Idaho Supreme Court's denial of Williams' motion to augment the record.

To the extent this Court considers the merits of Williams' constitutional claims, all of his arguments fail. Williams' appeal is timely only from the district court's May 25, 2012 order finally revoking his probation in Docket No. 40077.[3] (Compare R., p.178 (order revoking probation filed 5/25/12) with p.181 (notice of appeal filed 5/30/12).) On appeal, Williams challenges only the district court's decision to not reduce his sentence upon the final revocation of his probation. (See generally Appellant's brief.) The existing appellate record includes transcripts of the admit/deny and disposition hearings associated with Williams'

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[2] The Idaho Court of Appeals also noted that, in addition to filing a renewed motion to augment the record and/or expanding or clarifying his augmentation request in his appellant's brief, Cornelison also had the right to file a petition for review of its decision with the Idaho Supreme Court. Cornelison, 2013 WL 1613842 at *2 n.2.

[3] For the reasons set forth in Section II, *infra*, Williams" appeal in Docket No. 40078 is not timely.

final probation violation. (See generally 5/9/12 Tr.; 5/16/12 Tr.; 5/23/12 Tr.) The record also includes court minutes from Williams' change of plea and sentencing hearings, as well as each of the hearings that were the subject of his motion to augment the record; the original PSI and attachments; and two APSI's, prepared after each period of retained jurisdiction. (See generally R.; 10/28/04 PSI; 5/9/05 APSI; 6/27/11 APSI.)

Williams nevertheless contends this available information is inadequate for appellate review of his claims. (Appellant's brief, pp.6-20.) However, each of the hearings associated with transcript request occurred prior to his third period of probation. (See 10/25/12 Motion.) The district court did not have transcripts of these hearings at the time it elected to revoke Williams' probation and execute his sentences without reduction, and there is no indication that the district court actually relied on anything that was said at these prior hearings in making this sentencing determination.

Williams appears to assert that State v. Hanington, 148 Idaho 26, 218 P.3d 5 (Ct. App. 2009), which requires appellate review of the entire record of proceedings in the trial court up to and including the final revocation of probation, entitles him to transcripts of each of the hearings conducted throughout his criminal proceedings. (Appellant's brief, pp.11-13.) However, as explained in Morgan, such an interpretation of Hanington is too broad. Morgan, 153 Idaho at ___, 288 P.3d at 838. The Court of Appeals clarified that although it "will not arbitrarily confine [itself] to only those facts which arise after sentencing to the time of the revocation of probation . . . that does not mean that *all* proceedings in

the trial court up to and including sentencing are germane." Id. (emphasis original). Rather, "[t]he focus of the inquiry is the conduct underlying the trial court's decision to revoke probation." Id. Accordingly, the Court "will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal." Id. Because all relevant information to the district court's decision to not reduce Williams' sentence upon revocation of his probation is already included in the record on appeal, Williams has failed to show any due process violation resulting from the Supreme Court's order denying his motion to augment the record.

Additionally, Williams was afforded all the process he was due in relation to the preparation of the appellate record before the record was settled. As noted in Morgan, "The parties to an appeal have twenty-eight days from the service of the record to request additions or corrections to the record, Idaho Appellate Rule 29(a)." Id. at ___, 288 P.3d at 838-839. "[Williams] was afforded the opportunity to designate not only the standard clerk's record, but also additional records necessary for including in the clerk's record on appeal. I.A.R. 28(a), (c)." Id. Therefore, "[Williams] was provided the process by which he could designate all documents in the record necessary for appeal . . .." Id. Although the appellate rules also "provide[] that a party may move the Supreme Court to add to the settled clerk's record, nothing therein creates a right to such augmentation." Id. For these reasons, the Idaho Court of Appeals has rejected the proposition that "the ability to designate records necessary for appellate review under I.A.R. 28 [is] insufficient to afford due process." Id.

Williams' equal protection argument also lacks merit. The Court in Morgan rejected the argument that equal protection mandates augmentation of all transcripts the appellant desires, stating:

> Morgan was not denied the transcripts because of indigency. Morgan was afforded the opportunity to designate not only the standard clerk's record, but also additional records necessary for inclusion in the clerk's record on appeal. He had time to review the record and make any objections, corrections, additions, or deletions prior to settling of the record, pursuant to I.A.R. 29(a). Morgan's failure to fully and timely utilize the Idaho Appellate Rules, and his failure to demonstrate the need for the transcripts in his motion to augment the record, precluded him from including the first probation violation hearing transcripts, not his indigency. Morgan's motion to augment failed to make a showing that any appellant, indigent or otherwise, would be entitled to the record as requested.

Id. at ___, 288 P.3d at 839. Williams' equal protection claim fails for the same reasons.

Finally, the Court in Morgan also rejected the assertion that the denial of a motion to augment the record on appeal results in the deprivation of the effective assistance of counsel. Id. Williams, like Morgan, "has failed to demonstrate how effective assistance of counsel is not possible without the requested transcripts." Id.

The appellate record in this case is more than adequate to review Williams' claim that the district court abused its discretion by declining to reduce his sentences following the revocation of his probation. In addition, Williams has failed to show any violation of his equal protection rights or his Sixth Amendment right to the effective assistance of counsel. He has therefore failed to show that the Idaho Supreme Court violated his constitutional rights by denying his motion to augment the appellate record.

II.

Williams' Appeal In Docket No. 40078 Must Be Dismissed As Untimely

Williams argues that the district court abused its discretion by not *sua sponte* reducing his sentences upon revoking his probation in Docket No. 40078. (Appellant's brief, p.21.) Williams' appeal in Docket No. 40078 must be dismissed, however, because Williams failed to timely file his notice of appeal from any order over which the district court had subject matter jurisdiction.

Rule 14 of the Idaho Appellate Rules provides that an appeal in a criminal matter must be filed within 42 days from the date of the filing of "any judgment or order of the district court appealable as a matter of right." I.A.R. 14(a). An order entered by the district court without subject matter jurisdiction is void and, therefore, not appealable as a matter of right. State v. Urrabazo, 150 Idaho 158, 163, 244 P.3d 1244, 1249 (2010). The failure to timely file a notice of appeal from an appealable order is a jurisdictional defect and requires automatic dismissal of the appeal. I.A.R. 21; State v. Ciccone, 150 Idaho 305, 306, 246 P.3d 958, 959 (2010) (citation omitted); Urrabazo, 150 Idaho at 163, 244 P.3d at 1249.

Williams filed his notice of appeal within 42 days of the district court's May 25, 2012 order revoking his probation. (Compare R., p.103 with R., p.106.) As Williams concedes on appeal, however, that order is void for want of subject matter jurisdiction. (See Appellant's brief, p.1 n.1, p.25.) When the district court originally sentenced Williams, on November 8, 2004, it retained jurisdiction over Williams' case pursuant to Idaho Code § 19-2601(4). (R., pp.56-57.) At the

time, Idaho Code § 19-2601(4) strictly limited the period of retained jurisdiction to 180 days. I.C. § 19-2601(4) (2004). The court's jurisdiction thus expired on May 7, 2005, at which time Williams automatically remained committed to the custody of the Department of Correction. I.C. § 19-2601(4) (2004); Urrabazo, 150 Idaho at 163, 244 P.3d at 1249; State v. Petersen, 149 Idaho 808, 811, 241 P.3d 981, 984 (Ct. App. 2010). The court's subsequent order, entered June 30, 2005, purporting to place Williams on probation, and all of the orders that followed – including the court's May 25, 2012 order revoking Williams' probation – were entered without subject matter jurisdiction and are void. Urrabazo, 150 Idaho at 163, 244 P.3d at 1249; State v. Taylor, 142 Idaho 30, 31-32, 121 P.3d 961, 962-63 (2005); Petersen, 149 Idaho at 811, 241 P.3d at 984. Williams did not file his notice of appeal until May 30, 2012 (R., p.106) – over seven years after the district court lost jurisdiction. Because Williams did not file his notice of appeal within 42 days of any order appealable as a matter of right, his appeal is untimely and must be dismissed. Urrabazo, 150 Idaho at 163, 244 P.3d at 1249.

III.
Williams Has Failed To Establish That The District Court Abused Its Discretion By Executing His Sentence Without Reduction Upon Finally Revoking His Probation In Docket No. 40077

A. Introduction

Williams contends that the district court abused its discretion by not *sua sponte* reducing his sentence upon revoking his probation in Docket No. 40077. (Appellant's brief, pp.21-24.) A review of the record supports the district court's sentencing decision; Williams has failed to establish an abuse of discretion.

B. Standard Of Review

The decision whether to reduce an underlying sentence upon the revocation of probation is reviewed for an abuse of discretion. State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009).

C. The District Court Acted Within Its Sentencing Discretion

Upon revoking a defendant's probation, a court may order the original sentence executed or reduce the sentence as authorized by Idaho Criminal Rule 35. State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009) (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992); State v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989)). A court's decision to not reduce a sentence is reviewed for an abuse of discretion subject to the well-established standards governing whether a sentence is excessive. Hanington, 148 Idaho at 28, 218 P.3d at 7. Those standards require an appellant to "establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment." State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are: "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing." State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). The reviewing court "will examine the entire record encompassing events before and after the original judgment," *i.e.*, "facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." Hanington, 148 Idaho at 29, 218 P.3d at 8.

Williams has failed to demonstrate that the district court abused its discretion by not *sua sponte* reducing his sentence upon revoking his probation. As noted by the presentence investigator in the original PSI, Williams has "an extensive prior criminal history of drugs, alcohol and theft-related charges." (PSI, p.12; see also PSI, pp.3-6 (criminal record includes convictions for, *inter alia*, possessing drug paraphernalia, DWP (three convictions), resisting and obstructing officers, DUI, possessing a controlled substance (two convictions), burglary and aiding and abetting grand theft).) He has been placed on probation numerous times and, in fact, had the benefit and opportunity of three separate periods of probation in this case. (PSI, pp.3-4, 7; R., pp.144-47, 156-58, 166-70.) He also had the benefit of two separate periods of retained jurisdiction and participated in felony drug court. (R., pp.140-41, 163-64; 5/9/05 APSI; 6/27/11 APSI; 8/4/10 Report Of Violation.) Despite these numerous rehabilitative opportunities, Williams has demonstrated himself either unable or unwilling to abide by the law and the conditions of community supervision.

While he was on probation in the instant case, Williams continued to consume alcohol, smoked marijuana and "Spice," was cited for driving without privileges, changed residence without permission, associated with individuals with whom he was instructed by his probation officer to have no contact, and was terminated from rehabilitative programming, including felony drug court, TC Aftercare and a Cognitive Self-Change group. (7/3/08 Report Of Probation Violation; 8/4/10 Report Of Probation Violation; 4/25/12 Report Of Probation Violation.) Williams' probation officer attempted to gain Williams' compliance

with the law and the terms of his probation by employing a number of intermediate sanctions, including discretionary jail time, random UA's, drug-testing, drug court, and "considerable treatment" programs, but to no avail. (See id.) Even after two periods of retained jurisdiction, during which Williams participated in and successfully completed both the Therapeutic Community and "A New Direction" drug and alcohol treatment program, Williams continued to use illegal substances and, as a result, was terminated from his aftercare programming. (5/9/05 APSI; 6/27/11 APSI; 4/25/12 Report Of Violation.)

In deciding to finally revoke Williams' probation and order his sentence executed without reduction, the district court considered Williams' track record on probation and, specifically, his history of repeatedly resorting to the use of controlled substances while on community supervision. (5/23/12 Tr., p.9, L.17 – p.10, L.17.) The court considered Williams' request for an unsatisfactory discharge from probation but rejected it, reasoning:

> I am concerned that we are fighting the same fight now as we were fighting two, three, four, five years ago. In the meantime, we have done Drug Court. I think we spent a couple years in Drug Court, and then you went on a retained jurisdiction. You get back in July of 2011 and within six months are back to doing the same stuff. I just can't look past that. This is not an issue of technical violations. And sometimes I will give an unsatisfactory discharge after a long probation if there's just kind of technical stuff going on. This is not technical; this is just failure to complete the programming and use of – consistent use of drugs in violation of the rules. And those are behaviors that you make conscious decisions to do. In spite of the fact that you're doing some other things which should be positive, you are shooting yourself in the foot by gratifying yourself with the use of controlled substances. So I, frankly, am not going to reward that by an unsatisfactory discharge.

(5/23/12 Tr., p.9, L.18 – p.10, L.12.)

Just as Williams was not entitled to the reward of an unsatisfactory discharge for his repeated choices to use illegal substances while on probation, he was likewise not entitled to the reward of a *sua sponte* reduction in his underlying sentence. The district court's decision to revoke Williams' probation and order his sentence executed without reduction was entirely reasonable in light of Williams' continued refusal to abide by the conditions of community supervision and his failure to rehabilitate despite having been afforded numerous rehabilitative opportunities. Given any reasonable view of the facts, Williams has failed to establish an abuse of sentencing discretion.

CONCLUSION

The state respectfully requests this Court to dismiss Williams' appeal in Docket No. 40078 and to affirm the district court's order revoking Williams' probation and executing his underlying sentence without reduction in Docket No. 40077.

DATED this 16th day of May, 2013.

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of May 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

LORI A. FLEMING
Deputy Attorney General

LAF/pm